IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1835

NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS,
Petitioner,

v.

BROOKHAVEN CABLE TV, INC.; CAPITOL CABLEVISION, INC.; SAMSON CABLEVISION CORP.; TELEPROMPTER ELECTRONICS CORPORATION; WARNER CABLE OF OLEAN, INC.; NATIONAL CABLE TELEVISION ASSOCIATION, INC.; NEW YORK STATE CABLE TELEVISION ASSOCIATION; and HOME BOX OFFICE, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, the National Association of Regulatory Utility Commissioners, respectfully prays that a writ of certiorari be issued to review the judgement and opinion of the United States Court of Appeals for the Second Circuit entered on March 29, 1978.

OPINIONS BELOW

The opinion of the Court of Appeals, which has not yet been generally reported, appears at Appendix A to this petition. The Court of Appeals affirmed the decision of the

United States District Court of the Northern District of New York, Port, J., which has also not yet been generally reported, and which appears at Appendix B.[1]

JURISDICTION

The judgement of the Court of Appeals was entered on March 29, 1978. This petition is filed less than 90 days from that date pursuant to Supreme Court Rule 22. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Second Circuit erred in affirming a decision by the United States District Court for the Northern District of New York that the Federal Communications Commission [FCC or Commission] has the jurisdiction to preempt State regulation of rates charged for pay cable television, where this Court's consistent interpretation of FCC authority over cable television has been that the Commission's jurisdiction is limited to actions "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." [*United States v. Southwestern Cable Co.*, 392 U.S. 157, 178, 20 L. Ed. 2d 1001, 1016, 88 S. Ct. 1994 (1968)]?

2. Whether the United States Court of Appeals for the Second Circuit erred in affirming a decision by the United States District Court for the Northern District of New York allowing a Federal agency to preempt valid State regulation

[1]Petitioner NARUC has joined with petitioner Commissioners of the New York State Commission on Cable Television in preparing a Joint Appendix which has been separately bound in a companion volume, hereinafter cited as "App.".

of a particular field without determining any need for Federal regulation, for no purpose other than to preclude State regulation, and where Congress did not intend that the Federal agency should fully occupy the field.

STATUTORY PROVISIONS INVOLVED

1. Communications Act of 1934, as amended, 47 U.S.C. §151 *et seq.* (1970).

2. Chapter 466 of the Laws of 1972 of the State of New York, Article 28 (§§811-831).

STATEMENT OF THE CASE

Cable television (CATV) was developed over 30 years ago basically to provide retransmission of over-the-air broadcast signals to persons who, because of location, could not adequately receive a direct signal. These individuals would subscribe to cable services for a flat monthly fee. As cable became more sophisticated, additional services were added including the transmission of locally originated programming and informational programming.

Within the past five years, cable companies have been offering an additional service, at a separate rate, over non-broadcast programming channels. This service, known as "pay cable", is offered at a per-program or per-channel charge, and enables subscribers to view first run movies and sports events, without commercials, not available to the general public through conventional television broadcasting.

From a regulatory point-of-view, there is no major difference between the two types of services, yet the FCC has specifically ruled that localities should regulate the rates of ordinary subscriber cable television, whereas, the Court of Appeals in the decision under review herein, has held that

the FCC has preempted local and State regulation of pay cable rules.

In 1972, Article 28 of the New York Executive Law was enacted to provide for the comprehensive regulation of cable television companies operating within New York. [Chapter 466 of the Laws of 1972 of the State of New York, See Appendix F.] To administer the provisions of this new law, the New York State Commission on Cable Television (State Commission) was established.

Executive Law, Article 28, confers upon the State Commission various duties and responsibilities concerning the franchising process and the content of franchise agreements (Executive Law, §815). Executive Law, Section 825, provides, in part, that the rates charged by a cable television company must be those specified in its franchise agreement and cannot be changed except by amendment of the franchise. Executive Law, Section 822, provides that no amendment of a franchise agreement is effective without the approval of the State Commission. Executive Law, Section 821, provides that no person shall exercise a franchise, nor shall any franchise be effective, until the State Commission has confirmed the franchise by issuing a certificate of confirmation.

On March 1, 1976, the State Commission issued a *Clarification of Commission Policy* which stated, in pertinent part:

1. All subscriber rates imposed by cable television companies in New York must be authorized by the local franchise held by such companies, as required by Section 825 of the Executive Law.
2. No change in subscriber rates may be adopted without an appropriate amendment of the governing franchise.

3. Any such franchise amendment must be approved by this Commission before it may be effective, as provided in Section 822 of the Executive Law.
4. No exclusion or exemption from the above is provided by State Law for rates for any pay, auxiliary or subscription cable service.
5. Cable television companies that have already established pay cable services without following the appropriate legal requirements, as described above, will not be required at this time to make immediate efforts to amend their respective franchises. Such companies must however, file a formal notice with their respective municipalities and this Commission within the next two months, describing the nature of their pay cable services and the rates currently charged to subscribers for such services. Those cable television companies providing pay cable services and not so on record with their respective municipalities and this Commission by April 30, 1976, will face appropriate sanctions.
6. Active enforcement of these policies will be undertaken.

Clarification of Commission Policy, In the Matter of Rates Charged by Cable Television Companies for "Auxiliary" Programming (Docket No. 90010, March 1, 1976) [hereinafter cited as *Clarification or Clarification of Commission Policy;* Appendix E].

In response to this *Clarification of Commission Policy*, an action was instituted by the respondents, five cable

television system companies, two trade associations, and Home Box Office, Inc., a supplier of pay cable programming to cable television systems. In their complaint, filed April 7, 1976, the respondents, attempting to challenge the power of the State Commission to regulate the prices charged for pay cable, asserted four claims of relief: that the *Clarification* was in violation of the Supremacy Clause of the Constitution of the United States (art. VI, cl. 2), the Commerce Clause (art. I, §18, cl. 3), the First Amendment (free speech), and the Fourteenth Amendment (equal protection).

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, respondents moved for summary judgement on the first claim of relief, that the Federal Communications Commission [FCC] has preempted State regulation of rates charged for pay cable. In addition, the respondents sought to enjoin the Commissioners of the State Commission from implementing the *Clarification*.

On April 30, 1976, the Commissioners, by their attorney, the Attorney General of the State of New York, filed an answer and a cross-motion for summary judgement seeking a declaration that the Commission's *Clarification* does not violate the Supremacy Clause of the United States Constitution.

In an effort to protect the valid State interest in the regulation of local activities, the NARUC, on June 4, 1976, filed a motion to intervene, an answer, and a memorandum of law in support of the State Commission's cross-motion for summary judgement. NARUC's motion, as well as the FCC and the United States of America's motions to intervene for the cable companies, were subsequently granted by the Court. A motion submitted by the City of New York seeking leave to participate in the proceeding as *amicus curiae* was also granted.

Briefs were filed and oral argument was heard before Judge Port in the District Court on June 14, 1976. In his decision, entered on May 12, 1977, Judge Port granted the respondents' motion for summary judgement holding that State regulation of rates charged for pay cable has been effectively preempted by the FCC. In addition, the Court issued an injunction prohibiting the New York State Commission from regulating the rates charged for pay cable.

Citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 20 L. Ed. 2d 1001, 88 S. Ct. 1994 (1968) and *United States v. Midwest Video Corp.*, 406 U.S. 649, 32 L. Ed. 2d 390, 92 S. Ct. 1860 (1972), the District Court ruled that since pay cable television increases programming diversity, an area in which the Supreme Court has allowed FCC regulation [*Midwest Video*], it must follow that any FCC action which might perhaps also increase programming diversity must be permitted. The Court expressed its belief that any FCC efforts to "nurture and protect this infant medium" [i.e. pay cable] will increase program variety. It concluded that Federal preemption of pay cable rate regulation will "nurture and protect" pay cable, enabling it to grow, and therefore, such preemption must increase programming diversity and thus must be valid. [District Court Slip Op. App. B.]

Notices of appeal were subsequently filed by the State Commission and the NARUC. After briefing and oral argument before the Court of Appeals for the Second Circuit, the Court, on March 29, 1978, issued its decision affirming the District Court's ruling.

In its affirmance, the Court of Appeals reiterated the logic posed by the District Court and ruled, in essence, that any FCC action relating to cable television which perhaps increases programming diversity is *per se* "ancillary to the regulation of broadcasting" and is thus valid.

REASONS FOR GRANTING CERTIORARI

The Court should grant the petition for writ of certiorari for the following reasons:

1. The decision of the Court of Appeals is in direct conflict with decisions of the Eighth and District of Columbia Circuits construing the scope of FCC jurisdiction over cable television as interpreted by this Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 20 L. Ed. 2d 1001, 88 S. Ct. 1994 (1968), and *United States v. Midwest Video Corp.*, 406 U.S. 649, 32 L. Ed. 2d 390, 92 S. Ct. 1860 (1972).

2. The decision of the Court of Appeals establishes a completely novel interpretation of law relating to Federal-State regulatory power, in conflict with all Supreme Court decisions on the matter, by allowing the preemption of valid State jurisdiction by a Federal agency, where such agency has no specific Congressional authority to enter the field, where there has been found no compelling need for Federal regulation, and where the agency's expressed and only motivation is its desire to preclude lawful State regulation.

I. CONFLICT WITH OTHER DECISIONS RELATING TO THE SCOPE OF FCC JURISDICTION

It is well-established that there is no Congressional scheme or design regarding Federal regulation of cable television. Nowhere in the Communications Act of 1934 (47 U.S.C. §151, *et seq.*), nor in the various amendments to that Act, was the FCC granted the authority and power to regulate CATV. The FCC's authority in this area has evolved *solely* through judicial interpretation of the Communications Act and thus, for the FCC to validly preempt State regulation of pay cable rates, such preemption must specifically flow from these judicial decisions.

In 1968, this Court established the basic limits of FCC jurisdiction over the regulation of cable television by ruling that in order for the FCC to have any authority over a particular aspect of CATV, the Commission must establish that the area to be regulated must have a reasonable ancillary relationship to the FCC's authority over television broadcasting. This test was established in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 20 L. Ed. 2d 1001, 88 S. Ct. 1994 (1968), wherein the Court stated:

> . . . *the authority which we recognize today under §152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.* The Commission may, for these purposes, issue "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with Law," as "public convenience, interest, or necessity requires." 47 U.S.C. §303(r). *We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.*
>
> 392 U.S. at 178, 20 L. Ed. 2d at 1016 [Emphasis Supplied].

Several cases subsequent to *Southwestern Cable* have elaborated upon the basic "ancillary to the regulation of broadcasting" test. The NARUC submits that all Circuits which have looked at the jurisdictional issue have consistently ruled that there are strict limits on FCC authority over the regulation of CATV. However, the Second Circuit's decision in the *Brookhaven* case clearly represents a departure from accepted analysis and results in a tremendous expansion in FCC jurisdiction irreconcilably conflicting with the decisions of the other Circuits and with the Supreme Court.

The first case interpreting the *Southwestern Cable* standard was *United States v. Midwest Video Corp.*, 406 U.S. 649, 32 L. Ed. 2d 390, 92 S. Ct. 1860 (1972) [*Midwest Video I*] where a sharply divided court upheld an FCC requirement that cable system operators must not only engage in television rebroadcasting, but must also originate programs of their own. Chief Justice Burger, in concurring with the plurality stated:

> Candor requires acknowledgement, for me at least, that the Commission's position strains the outer limits of even the open ended and pervasive jurisdiction that has evolved by decision of the Commission and the Courts. The almost explosive development of CATV suggests the need of a comprehensive re-examination of the statutory scheme as it relates to this new development so that the basic policies are considered by Congress and not left entirely to the Commission and the Courts.
>
> 406 U.S. at 676, 32 L. Ed. 2d at 407.

In *NARUC v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) [*NARUC II*] the Court of Appeals held that an order of the FCC which preempted State regulation over use of CATV system leased access channels for two-way, point-to-point non-video communications was not within the discretion accorded the FCC. On the issue of the jurisdiction of the FCC over CATV the Court held:

> We are not persuaded that either the statute on its face or the construction which it has been given in *Southwestern* and *Midwest* supports the Commission's argument that it has a blanket jurisdiction over all activities which cable systems may carry on. The language of §152(a) is quite general and is not unambiguously jurisdictional in character. (footnote omitted.) *There is nothing in the words themselves compelling a conclusion that any or all operations of a cable system are within the ambit of Commission power.* . . . The Court [in *Southwestern* and *Midwest*] thus was not recognizing any sweeping authority over the entity as a whole, but was commanding that *each and every assertion of jurisdiction over cable television must be independently justified as reasonably ancillary to the Commission's power over broadcasting.*
>
> 533 F.2d at 612 [Emphasis Supplied].

In 1977, the District of Columbia Circuit again ruled on FCC jurisdiction over cable television. In *Home Box Office, Inc. v. FCC*, 567 F.2d 9 (D.C. Cir. 1977), *cert. denied*, ____ U.S. ____, 54 L. Ed. 2d 89 (1977) [*HBO*], the Court held that FCC rules pertaining to the siphoning of broadcast programming by cable television systems were invalid. Again the Court discussed FCC jurisdiction over CATV generally and stated that:

> The Supreme Court's opinions in *Southwestern Cable Co.* and *Midwest Video Corp.* thus look in two directions. First they recognize an expansive jurisdiction for the Commission based on Section 2(a) of the Communications Act and the need to give the Commission sufficient latitude to cope with technological developments in a rapidly changing field. But the opinions are also narrow. Even the broadest opinion, that of the plurality in *Midwest Video Corp.*, recognizes that the Commission can act only for ends for which it could also regulate broadcast television. . . Finally, the opinions in both cases go no farther than to allow the Commission to regulate to achieve "long-established" goals or to protect its "ultimate purposes." That these cases establish an outer

boundary to the Commission's authority we have no doubt, *cf. National Ass'n of Regulatory Utility Comm'rs. v. FCC, supra*; *Staff Of Subcomm. On Communications, Comm. On Interstate And Foreign Commerce, Cable Television: Promise Versus Regulatory Performance* 80-83 (1976) (Subcomm. Print), and if judicial review is to be effective in keeping the Commission within that boundary, we think the Commission must either demonstrate specific support for its actions in the language of the Communications Act or at least be able to ground them in a well-understood and consistently held policy developed in the Commission's regulation of broadcast television, *cf. Greater Boston Television Corp. v. FCC*, 143 U.S. App. D.C. 383, 394, 444 F.2d 841, 852 (1970), *cert. denied*, 403 U.S. 923, 91 S. Ct. 2229, 2233, 29 L. Ed. 2d 701 (1971).

567 F.2d at 27-28.

The most recent case to analyze FCC jurisdiction over CATV was *Midwest Video Corp. v. FCC*, No. 76-1496 (8th Cir. Feb. 27, 1978), *decision on petitions for cert. pending [MIDWEST Video II]*, where the Court of Appeals for the Eighth Circuit overturned FCC regulations on mandatory access and CATV channel capacity requirements. The Court based its decision on the belief that the rules in question were outside the FCC's jurisdiction.

In discussing the jurisdictional issue, the Court of Appeals ruled that:

> The standard established by the Court is "reasonably ancillary," not merely "ancillary." The standard is already broad, and the term "reasonably," requiring some nexus with the Commission's statutory responsibility, must not be read out of it. Nor can there be deleted what

> the Court said cable actions must be "reasonably ancillary" to, *i.e.*, "the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." 392 U.S. at 178. . . . Each regulation of cable television must individually stand or fall, not on legal precedent concerning other regulations, but on whether or not the regulation under review meets the standard established by the Court. The Commission reliance on *Southwestern* and *Midwest Video* ignores the indications in those cases that it has no sweeping jurisdiction over cable television, that whatever jurisdiction it may have is contingent upon its delegated powers, and that each attempt to regulate cable systems must be individually justified. *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 533 F.2d 601, 612 (D.C. Cir. 1976).

Slip. Op. at 25, 26.

The Court of Appeals for the Second Circuit attempts to distinguish the aforementioned cases on the grounds that those cases dealt with different factual situations. Admittedly, the factual issues presented in *Midwest Video I, NARUC II, HBO* and *Midwest Video II* are not directly relevant to the instant proceeding. Yet, in each of the cited cases, the Courts construed the basic jurisdiction of the FCC over cable television in order to reach the ultimate conclusion regarding the particular matter at issue. It would be the antithesis of all accepted standards of judicial review to ignore the precedential value of these cases, as the Second Circuit has done, in their interpretations of the limited power of the FCC over cable television.

It is important to note that the decision under review is not one limited to the facts of the case. The Second Circuit's decision not only relates to the Federal preemption of State authority over pay cable rates but has more far-reaching implications.

The FCC herein has adopted a policy, affirmed by the Federal District and Circuit Courts in New York State, that establishes the principal that the FCC has *carte blanche* authority over cable television. Furthermore, the policy endorsed by the lower courts in the *Brookhaven* case, that any FCC action which may perhaps increase programming diversity of cable television systems is *per se* reasonably ancillary to the regulation of broadcast television, is one that is totally in conflict with all other judicial decisions in the CATV area.

Programming diversity may be a valid goal for the FCC to pursue in both the broadcasting and cable fields, however, this goal, like all other regulatory objectives, must be weighed against the basic grant of authority to a Federal agency to act in a particular manner. As the Court in *Midwest Video II* has stated in discussing FCC objectives:

> A court may favor an agency-esponsed [*sic*] policy, while condemning the agency's exercise of unauthorized pursuit of that policy. The nobility of a goal or policy cannot justify usurpation, by the Commission or us, of a power to pursue it in whatever manner we think it might "work."
>
> The fundamental principle that governmental agencies are limited to the exercise of power delegated by the Congress would be nullified if an agency (like Disraeli, who is said to have preferred the power to write the public's slogans over the power to write its laws) were at liberty to expand its jurisdiction, as far and wide as it wished, by the facile, case-by-case step of rewriting the objectives found in the delegating statute. If "jurisdiction" be synonymous with agency-drafted, *ad hoc* "objectives," Congress and the courts become essentially superfluous.

Id., at 32-33.

II. PREEMPTION OF STATE AUTHORITY

It is well established that if State legislation is not in conflict with or repugnant to the Congressional scheme, the States are *not* preempted from legislating in those areas. *Cooley v. Board of Wardens,* 53 U.S. (12 How.) 299, 13 L. Ed. 996 (1851); *TV Pix, Inc. v. Taylor,* 304 F. Supp. 459 (D. Nevada, 1968) *aff'd* 396 U.S. 556, 24 L. Ed. 2d 746, 90 S. Ct. 749 (1970).

In *Savage v. Jones,* 225 U.S. 501, 56 L. Ed. 1182, 32 S. Ct. 715 (1912) the Supreme Court, at 533, stated:

> But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.

This Court has reiterated the above holding time after time. In *Schwartz v. Texas,* 344 U.S. 199, 97 L. Ed. 231, 73 S. Ct. 232 (1952) the Supreme Court noted that:

> If Congress is authorized to act in a field it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.
>
> 344 U.S. at 202-203, 97 L. Ed. at 235.

In *Head v. New Mexico Board,* 374 U.S. 424, 10 L. Ed. 2d 983, 83 S. Ct. 1759 (1963), the Supreme Court, in discussing preemption under the Communications Act of 1934, stated (at 429-430):

In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the "comprehensive" nature of federal regulation under the Federal Communications Act. "[T]he 'question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belong to it as to exclude the State, must be answered by a judgement upon the particular case'. Statements concerning the 'exclusive jurisdiction of Congress' beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." *California v. Zook*, 366 U.S. 725, 731, 93 L. Ed. 1005, 1010, 69 S. Ct. 841. *Kelly v. Washington*, 302 U.S. 1, 10-13, 82 L. Ed. 3, 10, 12, 58 S. Ct. 87. *In areas of the law not inherently requiring national uniformity, our decisions are clear in requiring that State statutes, otherwise valid, must be upheld unless there is found "such actual conflict between the two schemes of regulation that both cannot stand in the same area, (or) evidence of a Congressional design to preempt the field." Florida Avocado Growers v. Paul, 373 U.S. 132, 141, 10 L. Ed. 2d 248, 256, 83 S. Ct. 1210* (Emphasis Supplied.)

It is the NARUC's contention that the Second Circuit Court has totally ignored Supreme Court mandates in this area. It appears from the *Brookhaven* decision that the Court of Appeals believes that the exercise of Federal supremacy *is* lightly to be presumed and that the intent of the agency, rather than Congress, is the deciding factor. As the Court of Appeals in the *Brookhaven* case stated:

> The policy to preempt has been shouted from the rooftops, *see Schwartz v. Texas*, 344 U.S. 199, 202-03 (1952), and the FCC has explicitly indicated its intent that there be no price regulation whatever of the relevant area, *see Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 773-74 (1947).
>
> Slip Op. at 2167, App. A.

The NARUC submits that the Second Circuit has completely misconstrued the decisions in the cited cases and has, in effect, ruled that a Federal agency can define the parameters of its own jurisdiction even when that agency has not been granted any Congressional authority to regulate a specific field and even though the agency has no intention of regulating at the Federal level.

In *Bethlehem Steel Co. v. New York Labor Relations Board*, 330 U.S. 767, 91 L. Ed. 1234, 67 S. Ct. 1026 (1946), the Supreme Court ruled that the State of New York was precluded from permitting the unionization of Bethlehem's foremen despite Federal inaction in this area. However, the case turned upon the fact that the National Labor Relations Act, 49 Stat. 449, had *specifically authorized* the National Labor Relations Board to determine and certify appropriate bargaining units. Thus, regardless of Federal action or inaction, the States were precluded from certifying bargaining units. See also: *Oregon-Washington Railroad & Navigation Co. v. Washington*, 270 U.S. 87, 70 L. Ed. 482, 46 S. Ct. 279 (1926) [where the inaction of the Secretary of Agriculture was held not to allow State action since "the obligation to act without respect to the States is put directly on the Secretary. . . " *Id.* at 102-3], and *Chicago v. Atchison, T. & S. F. R. Co.*, 357 U.S. 77, 2 L. Ed. 2d 1174, 78 S. Ct. 1063 (1958) [where the ICC had specific authority over local inter-terminal motor vehicle transportation of

railroad passengers, thereby precluding regulation by the city].

In *Bethlehem*, the Supreme Court, in discussing the range of permissible State action in the face of Federal activity or lack thereof, stated, at 773-775:

> When Congress has outlined its policy in rather general and inclusive terms and delegated determination of their specific application to an administrative tribunal, the mere fact of delegation of power to deal with the general matter, without agency action, *might preclude state action if it is clear that Congress has intended no regulation except its own . . . In other cases, Congress has passed statutes which initiate regulation of certain activities, but where effective regulation must wait upon the issuance of rules by an administrative body. In the interval before those rules are established, this Court has usually held that the police power of the state may be exercised* . . . But when federal administration has made comprehensive regulations effectively governing the subject matter of the statute, the Court has said that a state regulation in the field of the statute is invalid even though that particular phase of the subject has not been taken up by the federal agency. . . However, when federal administration has been slight under a statute which potentially allows minute and multitudinous regulation of its subject . . . or even where extensive regulations have been made, if the measure in question relates to what may be considered a separable or distinct segment of the matter covered by the federal statute and the federal agency has not acted on that segment, the case will be treated in a manner similar to cases in which the effectiveness of federal supervision

> awaits federal administrative regulation. . . The states are in those cases permitted to use their police power in the interval . . . *However, the conclusion must be otherwise where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute. . .*
>
> *It is clear that the failure of the National Labor Relations Board to entertain foremen's petitions was of the latter class.* (Emphasis supplied.)

The Supreme Court in *Bethlehem* was specifically ruling that Federal preemption of the State role, in conjunction with Federal inaction as to specific Federal regulations, was mandated by statute. The lesson to be learned from *Bethlehem* is clear, *i.e.* that a Federal agency must have Congressional authority to preclude State action in a given field (*e.g.* rates, licensing, or certifying collective bargaining units) while that agency also refuses to specify Federal guidelines.

Considering that there is no specific statutory authority for FCC preemption of pay cable rate regulation, and that the judicial interpretation of FCC authority over CATV is fairly limited in scope (*i.e.*: "reasonably ancillary to broadcasting"), then any FCC preemption of State regulation of pay cable rates through mere policy statements and without specific Federal guidelines is an abuse of Federal power.

The NARUC believes that an agency certainly has the power to decide the extent of regulation necessary to achieve a stated purpose where plenary authority has been vested in that agency by Congress. But where Congress has not commanded that a field be regulated on the Federal level and the agency can only claim under authority peripheral to Congress' stated intent, *i.e.* ancillary to broadcasting, the States' power remains supreme. Here,

there has been no need shown for regulation on the Federal level and the usurpation of State power has become the end in itself.

It is therefore quite clear that the FCC here is attempting an action not previously allowed by any court. The FCC has attempted preemption in this area not for the purpose of regulating, but for the sole purpose of precluding lawful State involvement. Such an action by a Federal agency, where no conflict between Federal/State regulatory schemes exist, where no adequate need has been shown, and where no statutory authority exists, is surely invalid since it completely places valid State regulation at the whim of the Federal agency.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgement of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 1978 three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Counsel for all Respondents, as shown on the list below. I further certify that all parties required to be served have been served.

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